

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.23 OF 2001

Mr.Ajay Sayajirao Desai
Age 34 Years, Occupation Service
R/at: C/o. S.V.Desai, 582,
Panmala, Pune-Singhagad Road
Pune 411 030. .. Appellant.

Versus

Mrs.Rajashree Ajay Desai
Age 28 years, Occupation Service
R/at: C/o. Arun Anandrao Mohite,
Opp: Ranjeet Convent School,
Mahal,
Nagpur 440 002. .. Respondent.

Mr.D.M.Gupte for the appellant.
Mr.Ajit Kulkarni with Mr.H.P.Vyas for the
respondent.

CORAM : S.B.MHASE &
D.B.BHOSALE, JJ.

DATE : FEBRUARY 8, 2005.

ORAL JUDGMENT (PER D.B.BHOSALE, J.)

1. This appeal under section 28 of Hindu Marriage Act, 1955 (for short "the Act") is directed against the judgment and order dated 18th July, 2000 rendered by the Family Court, Pune in Petition No.A-801 of 1998 filed by the appellant-husband seeking dissolution of marriage on the grounds available under section 13(1) (i-a)

(i-b) of the Act as also for custody of a minor child - Jaydeep. The family court dismissed the petition with costs.

2. Background facts sans unnecessary details are as follows: The appellant (for short the 'husband') and the respondent (for short the 'wife') tied the nuptial knot on 27.5.1994. They were blessed with one child, who was born on 26.10.1995. The child is now nine years old. The marriage was what is commonly known as 'arranged marriage'. After the marriage the wife started residing with the husband, his parents and sister at Pune. At the relevant time the husband's mother was working with M.S.E.B. The case set up by the husband was that right from beginning the wife's behaviour was strange and rude. She went to Nagpur, her mother's place, for delivery in July 1995 and thereafter never returned to her matrimonial home at Pune. During her stay at Pune she subjected the husband to cruelty. Several instances are quoted in the pleadings as also in the evidence led by the husband which, according to him, amounted to cruelty. It appears that the wife had a white spot (lucoderma) on her body which was allegedly suppressed by her and her parents while

settling the marriage. After marriage, to suppress it further, it is alleged that twice she slapped the husband when there was an attempt to touch her body part where she had the white spot. According to the husband, from inception the wife started insisting separate residence to which he was not prepared being the only son of his parents. It is alleged that her conduct with his mentally challenged sister and parents was also not proper. The allegation is also made against the wife that she used to give threats to the husband that if he did not agree to reside separately from his parents and sister, he would suffer serious consequences. After delivery on 26.10.1995, the husband and his parents made several attempts to bring her back to Pune to which there was no response from the wife inasmuch as she wanted to reside separately. As a result of which on 20th February, 1996 the husband send a notice calling upon the wife to come back to Pune for cohabitation. The wife replied to the notice on 1.3.1996. Even thereafter the husband and his family members made futile attempts to bring her back. Against this backdrop the husband filed Petition No.P/A/877/1996 under section 9 of the Act for restitution of conjugal rights in the family court at Pune. After service of the

petition, the wife filed written statement on 6.7.1997 in which she tried to justify her withdrawal from the society of the husband. The husband on 10.7.1997 withdrew the said petition without assigning any reason whatsoever. Thereafter on 11.10.1998 he filed petition No.P/A/801/1998 seeking divorce on the ground of cruelty and desertion as also custody of the child. The wife filed her written statement in the petition opposing the prayers made therein on 4.1.1999. To prove the allegations against the wife, the husband examined himself and his mother, and in the course of their evidence produced several letters, written by the parties to each other, on record. As against this, the wife examined herself and her mother and also produced several letters on record in support of her contentions. The family court has extensively dealt with evidence led by the parties and found that the allegations which allegedly caused mental agony and cruelty were unfounded. Even on the point of desertion the family court held against the husband. Similarly, the prayer for custody was also rejected by the family court. It is against this backdrop the present appeal has been filed by the husband.

3. Before we advert to the merits of the case let us place on record that we made all efforts for reconciliation inasmuch as the wife expressed that she was prepared to go back to the husband alongwith the child. We interviewed the parties as also requested learned counsel appearing for the spouses to meet outside the court and try to reconcile their differences. However, all the efforts to reconcile their differences failed. Under the circumstances, we were left with no alternative but to proceed with the matter and decide the same in accordance with the law.

4. We heard the learned counsel appearing for the parties at length. Perused the pleadings as also evidence with their assistance. At the outset Mr.Gupte, learned counsel for the husband strenuously urged that looking to the conduct of the wife and instances quoted by the husband in his evidence it is clear that the marriage has broken irretrievably and there are no chances of their coming together. He further submitted that the cumulative effect of all the allegations made by the husband is sufficient to constitute cruelty and on that count alone he is entitled for divorce. He

invited our attention to the evidence led by the parties and submitted that the behaviour and conduct of the wife with the husband and his family members from the very beginning was strange and rude. A specific reference was made to the white spot on wife's person as also her behaviour with his mentally challenged sister. He further submitted that mental agony and stress that was suffered by the husband resulted in loosing his job. In so far as desertion is concerned, he submitted that the wife had left her matrimonial house on 31.7.1995 and since then there has been no cohabitation. He further submits that all the efforts made by him and his family members to get her back failed and, therefore, he was left with no other alternative but to seek divorce on the ground of desertion. Mr.Gupte further submitted that the allegations made by the wife against the husband and his family members in the written statement also caused him mental agony and cruelty. In support of his contentions he placed reliance on the judgment of this court in **Mr.Rajan Vasant Revankar Vs. Mrs.Shoba Rajan Revankar AIR 1995 Bombay 246** and the judgment in **Avinash Eknath Nikhalje Vs. Leela Avinash Nikhalje 2003(3) Mh.L.J. 450.**

5. On the other hand Mr.Kulkarni, learned counsel for the respondent-wife vehemently submitted that the instances quoted by the husband in his evidence are false and imaginary and even if it is assumed that they are true they are not sufficient to constitute cruelty. He further invited our attention to the relevant dates to contend that filing of the petition for restitution of conjugal rights in December 1996 itself shows that there was no cruelty till then. In so far as subsequent events are concerned there is no evidence, either oral or documentary, in support of those allegations. The husband has miserably failed to prove the ground of cruelty. In so far as desertion is concerned, he invited our attention to the evidence of the wife and contended that it is the husband who deserted the wife and his acts were responsible for not allowing the wife to go back to matrimonial home and, therefore, such a husband, according to Mr.Kulkarni, cannot take advantage of his wrong and seek divorce on the ground of desertion.

6. Before we proceed to consider the merits of the contentions urged by the learned counsel

appearing for the parties we would like to advert to the position in law, in so far as the ground of 'cruelty' as contemplated by clause (ia) of sub-section (1) of section 13 of the Act is concerned. The expression 'cruelty' has not been defined in the Act. The cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage can be defined as willful or unjustifiable of such character as to cause danger to life, limb or health, bodily or mentally, or as to give rise to a reasonable apprehension of such a danger. In other words 'Cruelty' contemplated by section 13(1)(ia) of the Act is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent or that it has become impossible for the spouses to live together. This is settled by the Apex Court in **N.Bhagat Vs. Mrs.D.Bhagat** reported in AIR 1994 SC 710. On a review of the earlier decisions of the Supreme Court, right from the case of **Dr.N.G.Dastane Vs. Mrs.S.Dastane** reported in AIR 1975 SC 1534, the Supreme Court has laid down the legal position which now obtains after the amendment of 1976 to the Hindu Marriage Act. The reference to the observations in paragraph 17 of the judgment in Bhagat's case (supra) would be useful, which read

thus:

"17. Mental cruelty in S.13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty is one case

may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they are made".

6.1 In a very recent judgment the supreme court in **A.Jayachandra V. Aneel Kaur 2005 AIR SCW 164** has once again considered the expression 'cruelty' and in paragraph 11 and 12 thereof held thus:

"11. The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course of conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must

begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

12. To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than 'ordinary wear and tear of married life'. The conduct, taking into consideration the

circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses

and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party".

6.2 It is against this backdrop we would now like to consider as to whether or not the allegations are true, and, if they are true, are they sufficient enough to cause reasonable apprehension that it would amount to physical or mental cruelty and that it would be harmful or injurious for the husband to live with the wife. In other words, whether the husband has produced sufficient evidence/material on record so as to satisfy our conscience that the relationship between the parties had deteriorated to such an extent, due to the conduct of the wife, that it would be impossible for them to live together without mental agony, torture or distress.

7. We have independently gone through the evidence led by the parties. The husband in his evidence has stated how his marriage was settled and that they were assured by the mother of the wife that there was no hereditary illness in their family. According to him after marriage in order to hide the white spot, the wife always avoided to

change in his presence and while they were on their honeymoon he tried to place his hand on her waist and she allegedly slapped him. He has further stated that immediately after coming back from their honeymoon the wife started insisting for a separate residence. She was not behaving properly with his mentally challenged sister. According to the husband, the wife also threatened that he would suffer serious consequence if he did not agree to live separately. This all happened prior to July 1995 i.e. within a span of less than one year. According to the husband, after two months of marriage, he noticed the white spot which was suppressed at the time of marriage. After she went for delivery on 31.7.1995 she did not come back, despite several efforts made by him and his parents. After delivery the husband and his parents visited Nagpur on 3-4 occasions and tried to persuade her to come back to Pune which she flatly refused on the ground that unless husband agrees to reside separately she would not return to Pune. He has specifically stated that her behaviour caused mental torture to him which ultimately resulted in losing his job in Milton company, where he was working on a contract basis. He was, therefore, forced to file a petition for

restitution of conjugal rights in December 1996 which he subsequently withdrew and in July 1997 filed the petition for divorce. In examination in chief he has simply denied the allegations made by the wife in her written statement against him and his family members. The reference was also made to the complaint lodged by him with Kothrud police station as also Nagpur police station. He has also referred to the application made to the telephone department requesting them to tap the telephone. It may be noted at this stage that the husband did not examine any witness from the police station or from the telephone department. We perused the cross examination of the husband. In the cross examination he has stated that initially their sexual relations were not proper, however, after he noticed the white spot their sexual relations improved. He has further stated that after delivery he went to Nagpur on 2-3 occasions and on every occasion he requested/persuaded the wife to come back to Pune which she refused. He has also stated that he had genuine desire to lead a matrimonial life with his wife. It appears that the husband had shifted to a new house when the wife was at Nagpur for delivery. There was extensive cross examination on the point as to

whether or not, the husband had informed his new address to the wife. We would make specific reference to the cross on this point, when we would deal with the ground of desertion in later part of the judgment. The other witness, namely, Mandakini, mother of the husband, has corroborated his evidence to some extent though we found several discrepancies and contradictions in their evidence.

8. Keeping the evidence of both these witnesses in view, it is clear that the husband has relied on the following instances to prove 'cruelty' against the wife (a) Non disclosure of hereditary illness that the wife was allegedly suffering from, namely, a white spot on her waist (lucoderma) (b). The slap given to the husband when he made an attempt to touch the waist of the wife where she had a white spot (c) Wife's insistence for separate residence (d) Her rude behaviour with his mentally challenged sister and parents (e) Threats given by the wife of serious consequences (f) Insulting and humiliating treatment meted out to the husband and his relatives whenever they visited Nagpur and in particular on 20.11.1996 (f) False allegations made against the husband and his mother in the written

statement filed in the Petition bearing No.P/A/No.877/1996 filed by the husband seeking relief of restitution of conjugal rights and (g) Threats given by the wife to the husband and his relatives on telephone and by sending letters.

9. From perusal of the evidence of the husband and mother it is clear that, though not immediately, atleast within two months of the marriage the husband came to know about the white spot (lucoderma) on wife's person. It is very hard to believe that for two months he did not notice the white spot on her person, though admittedly the marriage was consummated during that period. No grievance whatsoever was made by the husband when he came to know about the white spot on her waist. As a matter of fact in paragraph 25 of his testimony, he has categorically stated that when he saw the white spot for the first time they had no discussion about it. Moreover, he admits that they had healthy sexual relationship during that period and even thereafter. Even in paragraph 36 of his evidence, in reply to one of the questions put to him, he categorically stated that he had no grievance regarding the white spot on the waist of the respondent. In view of this admission given in

the cross examination as also in the evidence of the mother by no stretch of imagination it could be said that the white spot was suppressed at the time of marriage and even if she did, it caused mental cruelty to the husband when he noticed it after two months of the marriage. Even if it is assumed that the wife had white spot on her person, that was consciously accepted by the husband, probably, because he also had fully grown up mentally challenged sister in the house and that his parents wanted the wife to take care of her. Whether the wife really misbehaved with the sister or not is also doubtful. Except the bare words that the wife used to misbehave with the sister and his parents there is absolutely no material placed on record to show that she did, in fact, misbehave with them. As a matter of fact filing of the petition for restitution of conjugal rights in December 1996 and the efforts to bring her back to Pune show that the husband and his family members did not have any grievance whatsoever against the wife. The husband or his mother have not stated in what manner the wife misbehaved with the sister. In so far as allegations regarding threat of serious consequences is concerned, except the bare words no material, such as letters, is produced on record in

support of that allegations. If really the wife had given such threats, the question as to why the husband and his family members were making repeated efforts to bring her back remained unanswered. The allegation that the husband and his parents were insulted and driven out of his in-laws house at Nagpur on 20.11.1996 also seems to be an after thought and imaginary. We perused the letters placed on record and found that none of the letters would help the husband to prove any of the allegations made against the wife and her family members. In fact, the letters show that the relationship between the two families was not that bad as was tried to be potrayed in the evidence. In fact, the instances quoted and relied upon by the husband to show that he was subjected to cruelty, in our opinion, are not at all sufficient to constitute cruelty apart from the fact that most of the instances are not even worth believing.

10. The admitted factual matrix show that till 10th July, 1997, the day on which the petition seeking relief of restitution of conjugal rights was withdrawn by the husband, everything was smooth except some stray incidents of discord which are normal in any marriage and such normal wear and

tear cannot be a ground for seeking divorce. If we accept the allegation that the demand/insistance for separate residence amounts to cruelty, probably every petition coming to the Court for divorce on such ground will have to be allowed. It is a common knowledge that in almost every joint family we find that the wife, at some or the other stage, for some or other reason expect or insist for separate residence. Unless the intensity of such insistance goes to the extent so as to make a husband impossible to live together without mental agony, torture or distress, such material/allegation cannot be taken into consideration in support of the allegation of cruelty. In the present case, even if it is assumed that the allegation of separate residence was true, its intensity was definitely not that grave so as to constitute mental cruelty, otherwise the husband would not have filed a petition seeking relief of restitution of conjugal rights or had made any efforts to bring her back. Even the cumulative effect of all the allegations made by the husband and his mother in their evidence, in our opinion, would not amount to cruelty.

11. In the pleadings the husband has stated

that the allegations made in the written statement, filed in the petition seeking restitution of conjugal rights, caused mental agony and mental cruelty to the husband. It may be noticed, at this stage, that in the examination in chief, which was every extensive, he has not made any reference to those allegations and claimed that it caused mental cruelty. That petition was filed under section 9 of the Act. Section 9 provides that when either of the spouse has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why an application should not be granted, may decree restitution of conjugal rights. The explanation appended to section 9 provides where a question arises whether there has been 'reasonable excuse' for withdrawal from the society, the burden of proving 'reasonable excuse' shall be on the spouse who has withdrawn from the society of other. It is thus clear that even if it is assumed that the allegations made by the wife in her written statement against the husband and his family members are true, the burden of proving those

allegations so as to contend that there was reasonable excuse for withdrawal from the society of the husband is on the wife. If either of the spouse refuses to discharge his/her matrimonial obligation, he/she has to lead strong evidence in support of his/her refusal to discharge the obligations. The refusal to discharge the obligations can be said to be reasonable or justifiable only when it is impossible for one of them to live with the other. In the present case, the withdrawal by the wife from the society of the husband, according to her, was justified and reasonable as there was a demand of dowry and that there was a possibility of ill treatment on that count by the husband or his mother. As 'cruelty' could be a ground for divorce it can be offered as a defence in a suit for restitution of conjugal rights by the spouse against whom such petition is filed. The allegations made by the spouse in his/her written statement are, therefore, unless tested and proved to be false would not constitute cruelty or amount to cruelty or provide ground to constitute cruelty. In the instant case it is true that the wife did make allegations against the husband and his mother in her written statement filed in the petition seeking relief for

restitution of conjugal rights. Whether or not those allegations were true could not be tested in the petition since the husband, for the reason best known to him, withdrew that petition and after waiting for one year filed another petition seeking divorce on the ground of cruelty and desertion. The husband who did not give an opportunity to the wife to prove the cruelty meted out to her, for withdrawing her company from the society of the husband, in the petition for restitution of conjugal rights, in our opinion, has no right to seek divorce on the ground that the allegations made in the written statement caused mental agony and cruelty to him. It is true that the Apex Court in series of judgments has held the allegations made in the written statement are sufficient to constitute cruelty and that could be a ground for passing decree of divorce but certainly not in a situation we have come across in the instant petition. In this petition, the allegations made in that written statement were not reiterated by her in her written statement filed in the petition for divorce. That shows that the wife only sought to justify her withdrawal from the society of the husband in the petition for restitution of conjugal rights. Keeping in view the peculiar facts and

circumstances of the case, where the wife had made certain allegations as a part of her defence to oppose the petition for restitution of conjugal rights and who did not get an opportunity to prove those allegations due to premature withdrawal of the petition by the husband, such allegations, in our opinion, would not constitute cruelty.

12. The evidence of the husband, his mother and the cross examination of the wife coupled with the fact that, according to the husband, repeated efforts were made by them to bring her back and that the petition for restitution of conjugal rights was also filed by the husband would clearly show that the allegations made by the husband for seeking divorce on the grounds of cruelty were either false or in any case were not sufficient to cause mental agony or cruelty. The evidence of the husband and his mother was scanty and in no way established mental cruelty. The family court rightly observed that material produced was not sufficient to cause mental agony to the husband. We fail to understand as to why the husband, who had earlier filed petition for restitution of conjugal rights, suddenly withdrew that petition and filed petition for divorce. According to him

all along he was making efforts to bring the wife back. The only inference that can be drawn from the strange conduct of the husband is that the efforts to bring the wife back, as stated by him and his mother were either not genuine or are false. The wife all along and before this court also stated that she was and is prepared to go back to the husband alongwith child and even express regrets to the husband and his parents even though she had not committed any wrong. The trial court, in our opinion, has rightly rejected the claim of the husband that wife's behaviour and conduct caused mental agony and mental cruelty.

13. This takes us to consider the ground of desertion. It is now well settled that in so far as desertion is concerned, what is required of a spouse seeking divorce on the ground of desertion is proof that throughout the whole course of two years as contemplated by clause (ib) of sub-section 1 of section 13 of the Act, the other spouse has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without any cause

has been proved by the Court ought not to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion. In other words, in so far as deserting spouse is concerned, two essential conditions must exist, namely, the factum of separation, and the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as deserted spouse is concerned, namely, the absence of consent, and absence of conduct giving reasonable cause to the spouse leaving matrimonial home to form the necessary intention to bring cohabitation permanently to an end. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. These essential conditions must continue throughout the period of two years specified in clause (ib) of sub-section (1) section (13) of the Act. This position of law is settled by the Apex Court as back as in 1956, in **Bipinchandra Jaisinghbhai Shah Vs. Prabhawati** 1956 Bombay Law Reporter 322 which

has been followed and reiterated by the Apex Court and High Courts in several judgments.

14. The evidence of the husband shows that they changed their residence, where the wife last stayed with them before proceeding to Nagpur for delivery. Though the husband claims that the wife knew there new address, in paragraph 27 of the cross examination, he has categorically stated that:

"I shifted my residence. As the respondent was knowing our new address I did not inform her the address of new residence. I do not remember whether the respondent had send letter on the address of the office of my mother, as she was not knowing our new address. I did not receive a letter on my official address sent by the respondent".

14.1 Similary in paragraph 34 of the cross examination he has stated thus:

"It is not true to say that since I and the respondent are living separately I had not sent any letter to her. I did not know if the respondent had been to Pune on 4th

April, 1998 and could not find my residence as it was changed. It is correct that when I sent letter to the respondent I mentioned my address C/o my mother the official address of my mother. It is correct that it was my intention not to disclose my new residential address to the respondent" (emphasis supplied).

14.2 The evidence of the mother of the husband also could not improve his case any further. On the other hand the wife in her examination in chief has stated that she used to make telephone calls from Nagpur and ask the husband as to where they would be shifting but he avoided to answer the query. Even when she went to Pune alongwith the child she found the house locked. On that visit she had also approached a Counsellor of Asha Sanstha and with their intervention she tried to resume cohabitation. However, her all efforts failed. At this stage it is pertinent to note that a specific reference is made by the wife to the two letters, dated 9.11.1994, and the letter sent by the husband in April 1998. They are placed on record as 'Exhibits 85 and 88'. The letter dated 9.11.1994 supports her allegations against the

mother-in-law that she used to demand Rs.1,00,000/- and Hero Honda motor cycle and on that count she was subjected to cruelty which was bearable and, therefore, she never made an issue out of it for seeking divorce. In so far as 'Exhibit 88' is concerned, which was sent by the husband shows that he had informed her not to contact him. Despite this letter she has stated that she made an attempt to contact the husband and his mother on phone but there was no response from their side. Moreover, in the cross examination the husband in paragraph 27 stated as follows:

"It is correct that in month of December 1997 the respondent had informed that she was willing to cohabit with me. In the said letter, the respondent requested me to meet her personally and she was waiting for me. After December 1997, I had not gone to Nagpur".

14.3. Similarly in paragraph 31 he has stated as follows:

"Lastly, I had been to the respondent to bring her back in month of July, 1997.

Thereafter, I did not make any attempt to bring her for cohabitation. However, the respondent had shown her willingness to cohabit me by sending letters".

14.4. It is thus clear that the husband did not allow the wife to come back to him and resume cohabitation though she had keen desire which she expressed even before and after filing of the petition, before the family court as also this court. Before this court she went to the extent saying that she is prepared to express regrets for whatever wrong she allegedly committed and take care of the mentally challenged sister of the husband. From the evidence and her pleadings we find that such offer was made by her at every stage and it was genuine. Even in the petition for restitution of conjugal rights filed by the husband she had expressed her willingness to go back. Considering the cronology of the dates and events, it cannot lead to the conclusion that the husband has succeeded in proving his case of desertion. As a matter of fact the wife, in our opinion, never refused to resume cohabitation. In the facts of the present case there is no scope to hold that throughout the whole course of two years as

contemplated by clause (ib) of sub-section (1) of section 13 of the Act, the husband has without cause been in desertion or that the wife had persisted in the intention to desert throughout the whole period.

15. We would also like to consider the submission that the husband is entitled for decree of divorce on the ground that there is irretrievable break down of the marriage. The law is well settled that on the ground of irretrievable break down of marriage, the Court must not lightly dissolve a marriage. It is only in extreme circumstances the Court can use this ground for dissolving a marriage. In this case, the wife at all stages, as observed earlier, and even before us, has been ready to go back to the husband. It is husband, who has refused to take the wife back. The husband has made baseless allegations against the wife. He even went to the extent of filing the false complaints against the wife and her family members with the police at Pune and Nagpur which in our opinion was only to create evidence against the wife. The marriage, therefore, cannot be dissolved on the ground of irretrievable break down. The observations made by the Apex Court in paragraph 17

in **A.Jaychandra** (supra) case would be material wherein the law laid down in **Shiv Sunder's case AIR 2004 SC 5111** has been reiterated. The relevant observations read thus:

"17. Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It has held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately

failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases".

15.1 It is thus clear that the reasons assigned by the husband for his wife not being ready to live with him having been found false the husband cannot be given advantage of his own wrong and granted decree of divorce on the ground of desertion and particularly when the wife is prepared to live with him unconditionally. In our opinion, the petition of the husband, on the ground of desertion also fails. Accordingly, the appeal is dismissed with costs.

(D.B.Bhosale, J.)

(S.B.MHASE, J.)

:hcs/sbm/